

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-169

A.M.

vs.

R.M.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After nine years of marriage, A.M. (wife) and R.M. (husband) were divorced pursuant to a judgment of divorce nisi (divorce judgment) issued by a judge of the Probate and Family Court on January 10, 2018. Pursuant to the divorce judgment, the wife received sole legal custody and primary physical custody of the parties' two children, subject to the husband's overnight parenting time on Wednesdays and alternating weekends. With respect to the property division, the divorce judgment (1) assigned the marital home to the husband and required him to pay the wife \$80,000, representing her one-half share of the equity; (2) allowed the parties to retain the bank and retirement accounts held in their individual names, leaving the husband with approximately fifty-six percent (\$463,977) and the wife with approximately forty-four percent (\$369,223) of the

combined value of those accounts; and (3) required the husband to reimburse one hundred percent of the funds he withdrew from the children's bank accounts (\$4,500), and fifty percent of the funds he withdrew from the parties' joint bank accounts (\$9,619.69). The divorce judgment further required the wife to pay alimony to the husband of \$134 per week, and ordered the husband to pay a portion of the wife's attorney's fees in the amount of \$6,708.50. The husband appeals from the divorce judgment, principally challenging the parenting plan and determination of legal custody, the property division, the amount of alimony, and the award of attorney's fees.¹ We address his arguments in turn.

Parenting time and legal custody. The husband contends that the judge improperly limited his parenting time and ignored the recommendation of the guardian ad litem (GAL) for shared legal custody. We disagree.

¹ After entry of the appeal, the parties reached an agreement for modification of the divorce judgment (approved by a Probate and Family Court judge subject to approval by this court) that provides "[n]either party shall pay to the other party any child support at this time." As required by this agreement, the husband "dismiss[es]" so much of his appeal as challenges the child support order. To the extent the husband has preserved his appeal with respect to the allocation of the children's extracurricular and uninsured medical expenses, we see nothing in his argument warranting discussion. See Commonwealth v. Brown, 479 Mass. 163, 168 n.3 (2018).

We review custody determinations for an abuse of discretion.² Schechter v. Schechter, 88 Mass. App. Ct. 239, 245 (2015). "In custody matters, the touchstone inquiry [is] . . . what is 'best for the child.'" Hunter v. Rose, 463 Mass. 488, 494 (2012), quoting Custody of Kali, 439 Mass. 834, 840 (2003). See G. L. c. 208, § 28. "The determination of which parent will promote a child's best interests rests within the discretion of the judge . . . [whose] findings . . . 'must stand unless they are plainly wrong.'" Hunter, supra, quoting Custody of Kali, supra at 845.

Contrary to the husband's assertion, the judge did not grant primary physical custody to the wife as a means of "punishing" the husband. Rather, the judge found it was in the children's best interests to reside primarily with the wife, as she had been their "primary caregiver" since birth. See Custody of Kali, 439 Mass. at 843 ("it is ordinarily in the child's best interests to maintain [the existing parenting] arrangement" if it "is satisfactory and is reasonably capable of preservation"). This conclusion is rooted in several subsidiary findings made by

² "[A] judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made 'a clear error of judgment in weighing' the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives." L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014), quoting Picciotto v. Continental Cas. Co., 512 F.3d 9, 15 (1st Cir. 2008).

the judge, which have ample support in the record. Though the husband challenges the judge's finding that he was "less involved" in the children's care, this finding was based on the testimony of several witnesses, including the children's former nanny. As we are not "convinced" it is "plainly wrong," we decline to disturb it. Zaleski v. Zaleski, 469 Mass. 230, 237 (2014), quoting Felton v. Felton, 383 Mass. 232, 239 (1981).

We are similarly unpersuaded by the husband's contention that the judge improperly granted the wife sole legal custody. "[F]or joint custody or shared responsibility to work, both parents must be able mutually 'to agree on the basic issues in child rearing and want to cooperate in making decisions for [their] children.'" Rolde v. Rolde, 12 Mass. App. Ct. 398, 404 (1981).³ Here, the judge found the parties' relationship to be "dysfunctional and one of continuous conflict," and that it was in the children's best interests for the wife to have final decision-making authority when the parties cannot agree. See Carr v. Carr, 44 Mass. App. Ct. 924, 925 (1998) (joint legal custody not appropriate where "the relationship of the parties has been dysfunctional, virtually nonexistent, and one of

³ "Shared legal custody" is defined as "continued mutual responsibility and involvement by both parents in major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development." G. L. c. 208, § 31.

continuous conflict"). The judge specifically found that the husband's "continued aggressive and physically intimidating conduct toward [the wife] prevents the parties from being able to communicate effectively as to major decisions regarding the children," which finding was based on the judge's own "observations of [each party's] demeanor . . . while testifying at trial." "In this situation, '[t]he opportunity which the judge had to observe and appraise both parents is particularly important.'" Bak v. Bak, 24 Mass. App. Ct. 608, 616 (1987), quoting Stevens v. Stevens, 337 Mass. 625, 627 (1958).

The husband nevertheless contends that the judge abused her discretion by ignoring the GAL's recommendation for joint legal custody. The judge, however, was not required to follow the GAL's recommendation. See Sagar v. Sagar, 57 Mass. App. Ct. 71, 79 (2003) ("While a judge may consider a guardian ad litem's recommendations, the judge is required to draw his own conclusions"). Moreover, although the judge did not expressly reject the GAL's recommendation for joint legal custody, her reasons for declining to adopt it are apparent from her findings. Cf. Ventrice v. Ventrice, 87 Mass. App. Ct. 190, 196 (2015). Accordingly, we discern no abuse of discretion in the judge's determination of legal custody and parenting time. See Schechter, 88 Mass. App. Ct. at 245.

Property division. The husband claims the overall property division was inequitable due to the inclusion of his premarital assets in the marital estate, and to certain erroneous or inadequate findings made by the judge under G. L. c. 208, § 34. The husband also contends that the judge improperly ordered him to reimburse funds that he used to pay for the family's expenses following the parties' separation.

"Under G. L. c. 208, § 34, judges possess broad discretion to divide marital property equitably." Dalessio v. Dalessio, 409 Mass. 821, 830 (1991). "A division of marital property which is supported by findings as to the required factors [under § 34] will not be disturbed on appeal unless 'plainly wrong and excessive.'" Passemato v. Passemato, 427 Mass. 52, 57 (1998), quoting Heins v. Ledis, 422 Mass. 477, 481 (1996).

The husband claims he received a disproportionate share of the marital estate due to the inclusion of his premarital retirement contributions in the property division. We disagree. The marital estate may include property "whenever and however acquired," Rice v. Rice, 372 Mass. 398, 400 (1977), and "[o]nce the judge decides to include premarital assets as part of the [marital] estate, [s]he has considerable discretion in determining how to divide the assets equitably." Baccanti v. Morton, 434 Mass. 787, 792 (2001). Here, both parties' premarital retirement contributions were included in the marital

estate. See Moriarty v. Stone, 41 Mass. App. Ct. 151, 157 (1996) (affirming inclusion of parties' premarital retirement assets in marital estate). To the extent the husband claims his premarital retirement contributions exceeded those of the wife by \$98,441, this was largely offset by his retention of accounts exceeding those of the wife by \$94,753. The judge was not required to reimburse the husband dollar for dollar for his premarital retirement contributions. See Ross v. Ross, 50 Mass. App. Ct. 77, 81 (2000), quoting Fechtor v. Fechter, 26 Mass. App. Ct. 859, 861 (1989) ("Mathematical precision is not required of equitable division of property").

The husband further argues that the judge's findings under § 34 were "seriously lacking."⁴ We disagree. The judge made 106 separate findings of fact addressing all the mandatory and discretionary § 34 factors.⁵ Although the husband claims the

⁴ Several purported errors identified by the husband are either too minor to warrant discussion or are patently incorrect. For instance, the husband claims the judge failed to consider the date he was served with the complaint for divorce; however, the judge addressed the date of service in her findings. Moreover, although the husband claims the judge's findings regarding the amounts of the parties' respective liabilities were clearly erroneous, the parties stipulated to those amounts prior to the start of the trial.

⁵ The mandatory factors include "the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties, the opportunity of each for future acquisition of capital assets and income, and the amount and duration of alimony." G. L. c. 208, § 34. The discretionary factors

judge failed to assign proper weight to certain factors, including the wife's superior earning capacity and her future opportunity to acquire capital assets, "[t]he weight to be accorded each of the § 34 factors . . . is committed to the judge." Ross v. Ross, 385 Mass. 30, 37 (1982), quoting Langerman v. Langerman, 9 Mass. App. Ct. 869, 870 (1980). We discern no abuse of discretion in the judge's weighing of the relevant § 34 factors here.⁶

We likewise discern no merit in the husband's contention that the judge improperly ordered him to reimburse funds withdrawn from the children's accounts and the parties' joint accounts. The judge declined to credit the husband's testimony that he used the funds to pay for the family's expenses, noting that the husband failed to provide any credible documentary evidence to support his claim. We see nothing in the record which would warrant disturbing that credibility determination. See Johnston v. Johnston, 38 Mass. App. Ct. 531, 536 (1995)

include "the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit." Id.

⁶ The judge was permitted to weigh the wife's higher earning capacity against other relevant factors, including the wife's higher liabilities and greater contributions as the children's primary caretaker. See Moriarty, 41 Mass. App. Ct. at 157 ("The parties' respective contributions to the marital partnership remain the touchstone of an equitable division of the marital estate").

(assessing credibility of witness is "quintessentially the domain of the trial judge" and is "close to immune from reversal on appeal except on the most compelling of showings"). The judge implicitly concluded that the husband's unauthorized withdrawal of joint funds, shortly after the wife initiated divorce proceedings, constituted a dissipation of marital assets. See Waxman v. Waxman, 84 Mass. App. Ct. 314, 325 (2013) (dissipation "consists of conduct in the waning days of a marriage by one spouse intending to deprive the other of a fair share of the marital estate"). The judge was permitted to order the return of those funds to effectuate an equitable distribution of the marital estate. See Kittredge v. Kittredge, 441 Mass. 28, 37 (2004) ("dissipation must be viewed within the context of the statutory factors governing the equitable division of marital property under G. L. c. 208, § 34").

In light of the foregoing, we cannot say that the property division was "plainly wrong and excessive." Passemato, 427 Mass. at 57, quoting Heins, 422 Mass. at 481.

Alimony. The husband claims the judge abused her discretion in ordering the wife to pay alimony of only \$134 per week. We disagree.

"A judge has broad discretion when awarding alimony under the [Alimony Reform Act (act), G. L. c. 208, §§ 48-55],' Zaleski . . . , 469 Mass. . . . [at] 235 . . . , but the act establishes

presumptive parameters: the amount of general term alimony 'should generally not exceed the recipient's need or [thirty] to [thirty-five] per cent of the difference between the parties' gross incomes established at the time of the order being issued.'" Young v. Young, 478 Mass. 1, 5-6 (2017), quoting G. L. c. 208, § 53 (b). "[W]here the supporting spouse has the ability to pay, 'the recipient spouse's need for support is generally the amount needed to allow that spouse to maintain the lifestyle he or she enjoyed prior to termination of the marriage.'" Young, supra at 6, quoting Pierce v. Pierce, 455 Mass. 286, 296 (2009).

Here, the judge concluded that the husband required a "minimal contribution" from the wife to maintain the marital lifestyle. The husband claims the judge arrived at this conclusion by erroneously relying on his "exceedingly conservative, post-separation lifestyle." However, the judge found the parties were "conservative spenders" throughout the marriage, maintaining a "middle class" lifestyle despite their generous combined incomes. Though the husband challenges these findings, they are amply supported by both parties' testimony (including the husband's own description of the parties' marital spending habits as "frugal") and we will not disturb them. See Zaleski, 469 Mass. at 237. We are likewise unpersuaded by the husband's claim that the judge failed to consider his increased

need for alimony arising from the financial burden of paying the wife her \$80,000 share of the marital home's equity. Requiring the wife to pay additional alimony to the husband on such a basis would effectively result in the "redistribution by an alimony . . . order of specific assets that already have been equitably assigned" under G. L. c. 208, § 34. Dalessio, 409 Mass. at 828. Accordingly, we cannot say the judge's determination as to alimony was "plainly wrong or excessive." Bernier v. Bernier, 449 Mass. 774, 794 (2007), quoting Ross, 385 Mass. at 37-38.

Attorney's fees. The husband contends the judge improperly awarded the wife \$6,708.50 in attorney's fees. We disagree. A judge has broad discretion to award attorney's fees in a divorce case. See Moriarty, 41 Mass. App. Ct. at 159; G. L. c. 208, § 38. Here, the judge awarded the wife a portion of her attorney's fees incurred to defend several unsuccessful motions and complaints for contempt filed by the husband. The judge, having presided over the divorce proceedings and the related contempt actions, had "intimate[] familiar[ity]" with the issues in the case, the parties' respective financial positions, and the ability of the wife's counsel.⁷ Moriarty, supra. She

⁷ We also discern no merit in the husband's claim that the judge erred in failing to conduct a separate hearing on the issue of attorney's fees. See Robbins v. Robbins, 19 Mass. App. Ct. 538, 543 n.10 (1985) ("where the judge evinces first-hand knowledge

reviewed the detailed affidavit of counsel accompanying the wife's motion for fees and awarded approximately one-half of the fees requested therein. See Tatar v. Schuker, 70 Mass. App. Ct. 436, 451 (2007) ("The affidavit of the [wife's] counsel itemized fees and attested to the lead attorney's experience and market value for his services. In light of this, the probate judge was justified in accepting the validity of the fees as recounted in the affidavit of [the wife's] counsel"). Moreover, the judge was permitted to weigh the husband's unnecessarily litigious conduct when determining the reasonableness of the wife's fee request. See, e.g., Salten v. Ackerman, 64 Mass. App. Ct. 868, 875 (2005) ("trial judge [is] in the best position to determine whether the husband prolonged the case"). We therefore discern no abuse of discretion in the fee award. See Moriarty, supra.⁸

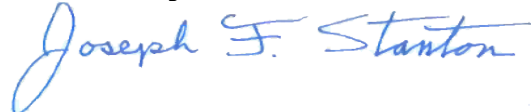
of the work performed and of going rates, an evidentiary hearing may not be necessary").

⁸ To the extent that we do not address the husband's other contentions, they "have not been overlooked. We find nothing in them that requires discussion" (quotation omitted). Brown, 479 Mass. at 168 n.3.

Conclusion. The divorce judgment dated January 10, 2018,
is affirmed.⁹

So ordered.

By the Court (Meade,
Massing & Lemire, JJ.¹⁰),



Clerk

Entered: July 15, 2019.

⁹ The wife's request for appellate attorney's fees is denied.

¹⁰ The panelists are listed in order of seniority.